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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 689

PINELLAS BROADCASTING COMPANY, *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent,*

and

THE TRIBUNE COMPANY, *Intervenor.*

INTERVENOR'S BRIEF IN OPPOSITION

COUNTER-STATEMENT

This is a case wherein the Examiner initially, and the Federal Communications Commission thereafter, were required to determine which of three corporate applications should be granted in the public interest,

convenience and necessity. Decisions of this sort seldom involve a comparison of absolute characteristics; nearly always, as here, there are relative considerations to be weighed. It is essential that facts which are significant in this process be clearly set forth.

Neither the Examiner nor the Commission described Nelson Poynter, the owner of 96.5% of Pinellas stock, as "... deeply rooted in the life of ... [St. Petersburg] and representative of practically every phase of public activity in that city." (Petition p. 8).

In fact, Mr. Poynter is engaged in two publishing enterprises and maintains two residences—one at St. Petersburg and one at Washington, D. C. He spends 70 percent of his time in St. Petersburg where he is a member of the Chamber of Commerce, the Yacht Club and the Bath Club (R. 106-8).*

The Commission's findings with respect to Mr. Poynter's residences and activities are surely not less favorable to the Petitioner than the evidence upon which they were based (R. 176-8), but it is apparent that for 30 percent of the time he is not a local resident and that, during his absences, there would have to be some degree of delegation of operating authority if service to the public were to continue.

The concepts of local ownership and integration for which Petitioner contends must be correspondingly extenuated.

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* References (R.) are to the printed Joint Appendix in the court below.

ARGUMENT

I.

THE DECISION BELOW IS CORRECT AND DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR OF THE COURT OF APPEALS

At least 35 recognizable "criteria" have been employed by the Commission in deciding these comparative cases. (Pike & Fischer, Radio Regulation, Vol. II, p. M-1451). From the beginning Petitioner has urged that two of these factors—local ownership and integration of ownership and management—should be decisive of this case. To bring about this result, there must exist, or be created, some fixed mechanical or mathematical relationship among all the established bases for decision. Such a relationship would be in contradiction of the exercise of discretion long recognized by this Court as an indispensable agency function. *Securities Exchange Commission* v. *Central-Illinois Securities Corp.*, 338 U. S. 96, 125-7.

Board of Trade v. *United States*, 314 U. S. 534, 547:

> "Any solution had to rest on informed judgment. And judgment in a situation like this implies, ultimately, prophecy based on the facts in the record as illumined by the seasoned wisdom of the expert body."

The remaining questions sought to be presented by Petitioner relate to diversification and the equitable distribution provisions of Section 307(b) of the Communications Act (Petition pp. 15-20). These have been raised by Petitioner for the first time, respectively, in this Court and in the Court of Appeals (Cf. Petition p. 15 and 26 and see Stipulated Statement of Issues in the court below, R. 16-17). They should be

rejected on the authority of *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U. S. 385; *Helvering* v. *Tex-Penn Oil Co.*, 300 U. S. 481.

The decision by the Court of Appeals in *Clarksburg Publishing Company* v. *Federal Communications Commission*, 225 F. 2d 511 (C.A. D.C.) is not in conflict. There the court merely remanded for hearing an application which had been granted by the Commission without hearing.

CONCLUSION

Because the decision below was correct, is not in conflict with any decision of this Court or any other court, and does not involve any important or novel question of federal law, the Petition for Certiorari should be denied.

Respectfully submitted,

PHILIP J. HENNESSEY, JR.
WARREN D. QUENSTEDT
816 Connecticut Avenue
Washington 6, D. C.
Counsel for Intervenor

PAUL M. SEGAL
GEORGE S. SMITH
Of Counsel.

March 15, 1956

MAR 1 3 19
HAROLD B. WILLEY

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THE TRIBUNE COMPANY, *Intervenor.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

LANDIS, TAYLOR & SCOLL
400 Madison Avenue
New York 17, N. Y.

MILLER & SCHROEDER
Munsey Building
Washington, D. C.

Attorneys for Petitioner

TELFORD TAYLOR
NEVILLE MILLER
Of Counsel

March 15, 1956

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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REPLY BRIEF FOR PETITIONER

In its brief in opposition to the petition, the Commission does not attempt to deny that this proceeding involves far-reaching questions of statutory interpretation and administrative policy. This tacit acknowledgment of the deep significance of these matters is hardly surprising, for in another case now pending in this Court,[1] the Commission is vigorously emphasizing

[1] *United States and Federal Communications Commission* v. *Storer Broadcasting Co.*, No. 94, certiorari granted Oct. 10, 1955, argued February 28 and 29, 1956.

the importance of closely related and overlapping[2] issues. If "diversification of station ownership" and "limiting absentee ownership and control of stations"[3] are policies amenable to judicial scrutiny and deserving of this Court's attention in the *Storer* case, as the government there rightly contended, they are equally so in the present case.

But with the shoe now on the other foot, the Commission opposes this petition, saying that the questions presented are not "novel or substantial" enough to warrant "further review by this Court."[4] Since the substantive issues are manifestly momentous and parallel to those in the *Storer* case, the Commission seeks to obscure their importance by means of a thick coating of "administrative discretion". This concept is thus invoked by the Commission on the one hand to sustain the multiple ownership rule involved in the *Storer* case, and on the other hand to justify an administrative determination here, utterly incompatible with the policies from which the multiple ownership rule derives.

The Commission and the majority opinion below both lay great stress on the fullness of the administrative proceeding, the "extensive and detailed" findings, and the fact that the Commission "carefully enunciated the bases for its conclusions."[5] But error lurks

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[2] See the government's petition for certiorari in No. 94, *supra*, at pp. 13-15 and its brief, pp. 28-42.

[3] See the government's brief in No. 94, pages 30 and 31.

[4] Brief in Opposition, pp. 7 and 13.

[5] See the opinion below (Pet. 23) and the brief in opposition (pp. 3 and 7).

in prolixity as well as brevity. That the Commission conducted a long hearing and engaged in a ratiocinative process does not establish its determination as a reasonable one.

Again in line with the opinion below, the Commission pleads for an "extremely limited" scope of judicial review because "Commission judgments of this type necessarily involve policy questions which Congress has committed to the agencies' discretion."[6] Of course the scope of review is "limited", but this word merely states the problem, which is not solved by the adjective "extremely". The general considerations governing judicial review of comparable administrative decisions have recently been restated by this Court.[7] Whether the determination here in question falls within or without the limits of judicial review can be decided only by scrutinizing the nature of the issues and the evidentiary record as a whole.

This, the Commission's brief signally fails to do.[8] Indeed, the decision simply will not bear scrutiny however it is regarded. Either the Commission has effected a radical and indefensible change of policy by throwing open the door to absentee ownership and

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[6] Brief in opposition, p. 9.

[7] *Federal Communications Commission* v. *RCA Communications Inc.*, 346 U.S. 86; *Universal Camera Corporation* v. *National Labor Relations Board*, 340 U.S. 474.

[8] Even in its statement of the "question presented", the Commission's brief (p. 2) gives the "silent treatment" to the crucial statutory and policy issues raised by the petition (p. 2), and attempts to reduce the entire case to a general question of "discretion".

abdication of licensee responsibility[9] or it has arbitrarily disregarded the law, the evidence, and long-established administrative policy, in this particular case.

We do not think it can be seriously contended that these matters are not sufficiently "important" to justify—indeed to require—this Court's review, especially when consideration is given to the numerous other television proceedings pending below and at the Commission,[10] in which these and comparable issues are involved.

Respectfully submitted,

TELFORD TAYLOR
400 Madison Avenue
New York 17, N. Y.

NEVILLE MILLER,
Munsey Building
Washington, D. C.
Attorneys for Petitioner

March 15, 1956

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[9] We do not undertake in this reply to discuss the errors of fact and law in the Commission's brief in opposition. But, in connection with the issue of abdication of licensee responsibility, we are obliged to call attention to the statement in their brief (p. 10, footnote 12) that: "The Commission found, however, that two members of the local management group which would operate the station were members of Tribune's board of directors, and that the proposed general manager of the station could work closely with those two members (R. 166-167)." The Commission made no such finding. Two directors (neither of them large stockholders) were members of the "local management group," but this group operates The Tribune Company (i.e., the newspaper, the *Tampa Tribune*), not the radio and television properties. As the record shows one of these two directors is entirely unconnected with the radio operations and the other "devotes very little time to radio". Tr. 7578, at pp. 166-167 of the Joint Appendix.

[10] See the petition p. 8, footnote 8.